

Human Rights Council: Historic resolution adopted for a legally binding instrument on TNCs

Geneva, 30 June (Kinda Mohamadieh*) – The United Nations Human Rights Council (HRC) adopted, through a vote, a historic and significant resolution to start a process for an international legally instrument on transnational corporations.

Officially entitled “Elaboration of an international legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights” (A/HRC/26/L.22) the resolution was adopted on 26 June at the 26th session of the HRC.

The resolution was co-sponsored by Ecuador and South Africa, and also supported by Bolivia, Cuba and Nevezuela. In the vote on the resolution, 20 Members of the HRC supported the resolution, while 13 Members abstained, and 14 Members voted against it.

Countries that supported the resolution include: Algeria, Benin, Burkina Faso, China, Congo, Cote D'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela, Vietnam. Countries that abstained include: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, and United Arab Emirates. Countries that voted against the resolution include: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom, and United States of America.

The resolution provides for the establishment of an open-ended intergovernmental working group (IWG) that is mandated with elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.

The resolution provides that the IWG shall hold its first session for five working days in 2015, before the 30th session of the HRC. The resolution also provides that the first two sessions of the working group shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument.

The resolution mandates the Chairperson-Rapporteur of the IWG to prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group, taking into consideration the discussions held at its first two sessions.

It recommends that the first meeting of the IWG serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles and elements of such an international legally binding instrument.

The resolution requests the IWG to submit a report on progress made to the HRC for consideration at its thirty-first session.

The resolution explains in a footnote that the reference to 'other business enterprises' denotes all business enterprises that have a transnational character in their operational activities, while it does not apply to local businesses registered in terms of relevant domestic law.

The resolution also makes reference as well to the important role of civil society actors in promoting corporate social responsibility and in preventing, mitigating, and seeking remedy for adverse human rights impacts of transnational corporations (TNCs) and other business enterprises.

In presenting the resolution to the HRC, Ambassador Luis Gallegos Chiriboga of Ecuador stressed that the Council owes its existence to those who tirelessly fight to protect human rights and the victims of human rights violation, including those that are most needful for protection and support. He called upon the Council to correct injustices, including the lack of protection for victims of violations of human rights abuses carried out by TNCs. He noted that these corporations benefit from binding international protections. However, victims of harmful corporate activities lack access to legal protection, while only having available voluntary norms.

Ambassador Chiriboga focused on the importance of protecting victims, noting that victims of disasters, such as that by Union Carbide in Bhopal (India), Shell in the Niger Delta (Nigeria), and Chevron in Ecuador, among others, are still waiting for remedy and fair compensation. He underlined the support of more than 500 civil society organizations from around the world, European Parliamentarians, and the Vatican to the initiative towards elaborating a legally binding instrument on TNCs and other business enterprises with respect to human rights.

Ambassador Chiriboga also stressed Ecuador's support for implementation of the United Nations Guiding Principles on Business and Human Rights.

[On 16 June 2011, the UN HRC endorsed by consensus the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" proposed by UN Special Representative John Ruggie (Resolution 17/4). More information available at:

<http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>. At its 17th session, in resolution A/HRC/17/4, the HRC decided to establish a Working Group on the issue of human rights and TNCs and other business enterprises, consisting of five independent experts, with the mandate to promote the dissemination and implementation of the Guiding Principles. More information available at:

<http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

In a statement at the 17th session of the HRC in June 2011, the delegation of Ecuador noted its conviction that the United Nations should continue to work on the issue of establishing binding international standards on the activities of TNCs. Ecuador's statement underlined that the Guiding Principles are "not binding standards", "are just a guide", and thus "are not mandatory". At the September 2013 session of the HRC, the delegation of Ecuador delivered a statement on behalf of more than 85 countries stressing the need for a legally binding framework to regulate the work of TNCs. More on this statement is provided below.]

Speaking on behalf of South Africa, Ambassador Abdul Samad Minty noted that the government of South Africa accords special priority in regard to issues of TNCs, business, and human rights. He highlighted that the South African government holds a strong view that these entities, which are the primary drivers of globalization, cannot operate in a void. He added that TNCs and other business enterprises often operate in an environment where appropriate national legislation to effectively regulate their operations, or mitigate the propensity for their violation of human rights, is either absent or very weak.

Experience shows that in countries of the North, where there are strong binding laws and regulations promulgated by national parliaments, the violations of human rights by corporations are significantly minimized, according to Ambassador Minty.

He stressed that a universal regulatory framework in the form of a binding instrument to provide legal protections, effective remedies, as well as a range of other measures in quest for protections of victims, is desirable and imperative. He also recalled that global mass mobilizations by over 500 civil society organizations calling for such an instrument.

Countries take the floor to explain their vote

China expressed its support for joined efforts by the international community to promote better protection and respect of human rights. It added that it is in favor of pursuing dialogue and cooperation to implement the United Nations Guiding Principles on Business and Human Rights and to ensure their actual effects. China noted that the formulation of an international legal instrument is a complex issue, highlighting the disparities among countries in terms of economic development, judicial systems, systems of enterprise, as well as historical and cultural backgrounds. China underlined the importance of being gradual towards gathering consensus.

India noted that the issues of TNCs and other business enterprises is an area where the international community must work together, not only to encourage businesses to respect human rights, but also to hold them accountable for violations arising out of their business operations. India added that the work of the existing expert working group on the issue of human rights and TNCs and other business enterprises during the last three years provided guidance to States and businesses and shed light on glaring gaps in available protections. However, India underlined, the Guiding Principles on Business and Human

Rights have their own limitations and carry little impact in the case of victims whose human rights have been violated by operations of TNCs.

India added that the resolution seeks to open an opportunity for States to discuss, in a focused manner, the issues of TNCs, and provides an acceptable road map to move forward in this direction. As States promote the integration of the world economy and capital flows across borders, it is important to plug possible protection gaps that may arise due to business operations, it added. When States are unable to enforce national law with respect to gross violations committed by businesses, or to hold them accountable due to the sheer size and clout of TNCs, the international community must come together to seek justice for the victims of violations committed by TNCs, India stressed.

The United States, the European Union, Japan, the United Kingdom and Ireland spoke against the resolution.

The United States focused in their remarks on the United Nations Guiding Principles on Business and Human Rights, noting that they consider them a success, despite the limited three years since they have been endorsed. While agreeing that more needs to be done to improve access to remedy for victims of business-related human rights abuses, the United States raised concern that the resolution on a legally binding instrument is not complementary to the work on promoting the implementation of the United Nations Guiding Principles.

The United States added that they perceive that the proposed intergovernmental group would create a competing initiative that would undermine efforts to implement the Guiding Principles. It expected that focus would turn to the new instrument, while companies, States, and other actors would unlikely invest significant time and money in implementing the Guiding Principles. The United States cautioned that a one-size-fit-all instrument would be unlikely able to address concerns related to the complex issues of regulating business, noting that such an instrument would be binding only on States that become party to it. It also raised few practical questions concerning the application of the proposed international instrument to corporations, which are not subject to international law. The United States expressed its unwillingness to participate in the proposed intergovernmental working group.

Italy, speaking on behalf of the European Union (EU) Member States, focused on the efforts undertaken since 2011 to disseminate and implement the United Nations Guiding Principles on Business and Human Rights. Italy referred to national action plans elaborated by several EU Member States to reflect the Guiding Principles. It added that the Guiding Principles do not exclude further legal developments, while reaffirming their understanding that what has been done so far is not enough to prevent abuses and enable access to remedy when abuses occur. The EU stressed that no international mechanism could replace robust domestic legislation and processes involving all stakeholders, calling for additional focus on implementation of the Guiding Principles on Business and Human Rights. The EU also noted that the resolution focuses on TNCs, while many abuses are committed by enterprises at the domestic level.

The United Kingdom (UK) was of the opinion that issues of business and human rights should be addressed through national rule of law at individual state level, and through the application of fair, just, and independent legal systems that can protect victims and ensure that business activity can thrive. The UK added that focusing on the United Nations Guiding Principles on Business and Human Rights would be the best way forward in dealing with these important issues.

Japan underlined their commitment to the Guiding Principles on Business and Human Rights, noting that the resolution could undermine efforts undertaken in regard to their implementation. The Guiding Principles provide guidance on how States could fulfill their obligations in the area of human rights, while respecting business-related international legal obligations, according to Japan. The international community could deepen its understanding in regard to an international legally binding instrument through examining best practices in this regard in the course of implementing the Guiding Principles, Japan added.

Ireland aligned itself with the views expressed by the EU, underlining its commitment to the Guiding Principles on Business and Human Rights, while noting that the resolution could undermine the process of their implementation. While noting the importance of addressing barriers to access to judicial and non-judicial remedies, Ireland was of the opinion that an intergovernmental working group would not be the appropriate fora for such a discussion.

The 26th session of the HRC also adopted, by consensus, another resolution entitled “Human rights and transnational corporations and other business enterprises” (A/HRC/26/L.1) co-sponsored by Norway, Russia, and Argentina. The resolution extends for a period of three years the mandate of the existing expert Working Group on the issue of human rights and TNCs and other business enterprises, as set out in HRC resolution 17/4.

Background on the process towards resolution A/HRC/26/L.22/Rev.1

In September 2013, the delegation of Ecuador, speaking on behalf of more than 85 countries, including the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru, and, Ecuador, underlined the need for a legally binding instrument in a statement delivered at the 24th session of the HRC.

States subscribing to the statement stressed that “the increasing cases of human rights violations and abuses by some TNCs reminds us of the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises”. The statement noted that an “international legally binding instrument, concluded within the UN system, would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States,

and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies”.

In pursuit of the discussion on TNCs, human rights, and a legally binding instrument in this area, the Permanent Missions of Ecuador and South Africa to the United Nations in Geneva co-organized a workshop during the week of the 25th ordinary session of the HRC to explore this issue.

The workshop aimed at contributing to clarifying the ways in which a legally binding instrument on business and human rights would provide a framework for enhanced State action to protect rights and prevent the occurrence of human rights abuses. It also aimed at discussing the difficulties faced by developing countries when trying to hold transnational corporations accountable, as well as the gaps under the current soft law framework.

In this regard, the discussion tackled the extraterritorial duties of States, obstacles that victims of human rights violations face when trying to access justice and adequate remedies, including national, regional and international courts and non-judicial mechanisms.

According to the report resulting from the meeting, some of the main elements highlighted during the discussion focused on the importance of recognizing that there are gaps in the international legal framework related to the duty to protect human rights in respect to business activities, and the concentration of related instruments in soft law. The report noted as well the recognition of the asymmetry between rights and obligations of TNCs; while TNCs are offered rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights.

Furthermore, the report noted that the obligation of States to regulate business activities within their territorial jurisdiction is clear, but on the other hand their obligation regarding corporate conduct acting abroad is not clear. The report noted as well the importance that participants accorded to building on lessons learned from the history of addressing the issues of business and human rights, including the experience of discussing the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.

Mobilization by civil society groups

The months before the 26th session of the HRC witnessed mobilization by international networks, organizations, and social movements from various regions, organized under the umbrella of an alliance calling for binding international regulation to address corporate human rights abuse. A statement calling for an international legally binding instrument has been signed by 610 civil society organizations and social movements as well as 400 individuals from 95 countries.

The signatories call upon States to elaborate an international treaty that “affirms the applicability of human rights obligations to the operations of transnational corporations and other business enterprises”. They add that the treaty should “require States Parties to monitor and regulate the operations of business enterprises under their jurisdiction, including when acting outside their national territory, with a view to prevent the occurrence of abuses of human rights in the course of those operations”.

They underline that the treaty should “require States Parties to provide for legal liability for business enterprises for acts or omissions that infringe human rights and to provide for access to an effective remedy by any State concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there are bases for the States involved to exercise their territorial or extraterritorial protect-obligations”. The statement stresses as well the importance of providing for “an international monitoring and accountability mechanism” and for “protection of victims, whistle-blowers and human rights defenders that seek to prevent, expose or ensure accountability in cases of corporate abuse and guarantees their right to access to information relevant in this context” (The call is available at the following website: <http://treatymovement.com>).

In a press release commenting on the adoption of the resolution initiating a process to develop a legally binding instrument on TNCs, other business enterprises, and human rights, the Treaty Alliance emphasized that “the establishment of a binding instrument is complementary to the implementation of the Guiding Principles and necessary to ensure glaring gaps in protection are addressed”. The Alliance explained in the press release that, “some States opposing the resolution made attempts to come to a compromise, but were not willing to provide a concrete path towards the drafting of a binding instrument to prevent human rights abuses by TNCs and other business enterprises and allow for the provision of remedy to victims”.

The Alliance added that, “while companies must respect all human rights, as reaffirmed in the UN Guiding Principles on Business and Human Rights, they currently are not held accountable under international human rights law. Thus, the implementation of the Guiding Principles at the national level has been slow and the Guiding Principles remain insufficient to prevent human rights violations. In the meantime, many victims around the world continue to suffer without access to justice”.

The Alliance further noted that “an intergovernmental process will contribute to addressing current imbalances under international law, particularly in light of protections companies can obtain under Bilateral Investment Treaties and Free Trade Agreements, which have allowed corporations to sue States”.

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